WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
OCTOBER, 2012

The cases listed below will be heard in the Wisconsin Supreme Court Hearing Room, 231 East, State Capitol.

This calendar includes cases that originated in the following counties:

Brown
Kenosha
Milwaukee
Sauk
Sheboygan
Washington
Waukesha
Winnebago

THURSDAY, OCTOBER 4, 2012

9:45 a.m.	10AP2597-CR	- State v. Dennis D. Lemoine
10:45 a.m.	11AP2067	- Mary E. Marlowe v. IDS Property Casualty Insurance Company
1:30 p.m.	11AP659-D	- Office of Lawyer Regulation v. Joseph W. Weigel

FRIDAY, OCTOBER 5, 2012

9:45 a.m.	10AP1952	-	State v. Brian K. Avery
10:45 a.m.	11AP259-D	-	Office of Lawyer Regulation v. Matthew C. Siderits

TUESDAY, OCTOBER 9, 2012

9:45 a.m.	10AP3153	-	Lynn Bethke, et al. v. Auto-Owners Insurance Company
	11AP593	-	Angelia Jamerson v. Department of Children & Families
1:30 p.m.	{11AP407-CR	-	State v. Brent T. Novy
	{11AP408-CR	-	State v. Brent T. Novy
	{11AP409-CR	-	State v. Brent T. Novy

TUESDAY, OCTOBER 23, 2012

9:45 a.m.	11AP564	-	Marshall Schinner v. Michael Gundrum, et al.
10:45 a.m.	10AP2942-D	-	Office of Lawyer Regulation v. John Kenyatta Riley
1:30 p.m.	{11AP813-CR	-	State v. Juan G. Gracia
	{11AP814	-	City of Menasha v. Juan G. Gracia

In addition to the cases listed above, the following case will be decided by the court based upon the submission of briefs without oral argument:

10AP1348-D - Office of Lawyer Regulation v. David A. Goluba

The Supreme Court calendar may change between the time you receive these synopses and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at 608-266-1880. That office will also have the names of the attorneys who will be arguing the cases.

Radio and TV, and print media wanting to take photographs, must make media requests 72 hours in advance by calling Supreme Court Media Coordinator Rick Blum at 608-271-4321. Summaries provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
THURSDAY, OCTOBER 4, 2012
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed a Sauk County Circuit Court decision, Judge Guy D. Reynolds, presiding.

2010AP2597-CR State v. Lemoine

This case examines issues arising from the conviction of Dennis D. Lemoine on charges of having sexual contact with a child under 13 years of age, contrary to WIS. STAT. § 948.02(1)(e) (2009-10). Lemoine asks the Supreme Court to review lower court decisions on whether statements he made to police were voluntary and properly admitted, and if the admission of his statements was harmless error.

Some background: Lemoine was accused of sexually assaulting a five-year-old girl by touching her vaginal area during a visit to the girl's parents' home in Baraboo on April 23, 2007. Lemoine had agreed to watch the girl for her parents as she jumped on a trampoline in the backyard while her parents visited outside the garage with someone else. Lemoine said that at one point, the girl ran over to him and jumped onto his lap as he sat on the back porch steps.

Four days later, the girl disclosed the alleged assault to her parents, who reported it to police. On April 29, the girl's mother, grandmother, and a detective took her to a Madison hospital for a sexual-assault examination.

On the morning of April 30, the detective interviewed the girl at the sheriff's department. The interview was video recorded and transcribed, and a DVD of the interview was played at trial. In the interview, the detective asked he girl repeatedly in various ways if anyone had ever given her a "bad touch." The girl did not implicate Lemoine at this time. The detective and the girl then left the room, and the girl had contact with her mother. When the detective and the girl returned 10 minutes later, the girl disclosed that Lemoine had pulled down her underwear and touched her "pee-pee."

Later that day, the detective called Lemoine and asked him to come to the police station without providing a reason. Lemoine arrived within an hour, and the detective took Lemoine to a small room to be questioned. The interview was recorded. Lemoine maintained his innocence when a police detective confronted him with the assault allegations. A police lieutenant told Lemoine that the girl had just "gone through some very lengthy medical procedures" and police were awaiting the test results. The detective also asked Lemoine for a DNA sample. Lemoine agreed to provide a DNA sample but none was taken. The lieutenant then suggested he could "help out" Lemoine by limiting publicity if he "came clean."

Lemoine asked what would happen if he admitted to the allegations. The lieutenant responded by promising Lemoine that if he gave the "true story . . . today" he would not spend the night in jail; that this would "give you time to call an attorney . . . [o]therwise, you know, we can lock you up," and that, in jail, he would not be able to make phone calls.

Moments later, the lieutenant encouraged Lemoine to talk to the district attorney so that "it doesn't end up in court" or "in the public forum," and Lemoine said he would admit to the allegations if he were not taken to jail. At the end of the interview, Lemoine was issued a citation, given a court date, and allowed to leave.

The state charged Lemoine with first-degree sexual assault of a child and the case went to jury trial. Lemoine moved unsuccessfully to suppress certain incriminating admissions made to investigators on April 30 on grounds that they were coerced.

During the trial, Lemoine admitted the girl had sat on his lap, and that he accidently touched her crotch. The nurse who conducted the girl's sexual assault exam six days after the alleged incident testified she observed "redness" near the girl's vaginal opening, which she said could have been from "inflammation, irritation or infection." The nurse testified she did not find evidence of sexual assault, but that "[i]f there is a penetration assault, tissue heals very quickly."

On appeal, Lemoine argued that his incriminating statements were involuntary. In particular, he alleged that the lieutenant promised not to put him in jail that night if he told the "true story" and suggested that, if he were jailed, he would be unable to exercise his constitutional right to counsel; that police were deceptive regarding the extent of the girl's medical exam; that police failed to give Miranda warnings; and that the lieutenant offered to limit publicity and suggested the case could be kept out of the "public forum" even if he gave an incriminating statement.

The state said Lemoine's statements were voluntary because: (1) the promise not to jail Lemoine in exchange for his cooperation was not coercive conduct because the investigators kept their promise by allowing him to leave after the interview; (2) the lieutenant's representations about access to counsel from jail were "not patently false;" (3) Miranda warnings were not required because defense counsel conceded that Lemoine was not in custody; (4) the interview lasted only 75 to 80 minutes; and (5) Lemoine was a person of ordinary intelligence who was not particularly susceptible to coercive tactics.

The Court of Appeals assumed without deciding that the challenged portion of Lemoine's incriminating statements were involuntary and therefore should have been suppressed. The Court of Appeals then held that the circuit court's admission of these statements was harmless error, leading Lemoine to seek Supreme Court review.

WISCONSIN SUPREME COURT
THURSDAY, OCTOBER 4, 2012
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which reversed a Brown County Circuit Court decision, Judge Donald R. Zuidmulder, presiding.

2011AP2067 Mary E. Marlowe v. IDS Property Cas. Ins. Co.

This case, arising from a dispute over insurance coverage, examines the arbitration process and the authority of arbitrators to determine the necessity and scope of allowable discovery.

Some background: The Marlowes were involved in an auto accident with an uninsured motorist. They asserted an uninsured motorist claim under their policy with IDS Property Casualty Insurance Co. (IDS). The parties agreed to arbitrate, and a panel of three arbitrators was selected. IDS requested discovery from the Marlowes, including depositions, production of medical records, and an independent medical examination. The Marlowes said they would not comply because, under § 788.07, Stats., discovery in arbitration is limited to taking depositions.

In response, IDS pointed to the portion of the arbitration agreement which said, "Local rules of law as to procedure and evidence will apply." IDS argued that this provision meant that discovery procedures found in Wisconsin statutes govern the scope and method of discovery. The Marlowes disagreed and continued to refuse to comply with the discovery requests.

In October of 2010, the arbitration panel issued a decision and order allowing discovery to the extent permitted by ch. 804, Stats., governing discovery in civil litigation. The panel concluded that since the arbitration agreement said "local rules of procedure and evidence" would apply, the agreement unambiguously allowed for routine discovery according to the civil rules of procedure. The Marlowes sought reconsideration of this decision. The panel issued a supplemental decision and order confirming its earlier ruling.

The Marlowes filed a declaratory judgment action in circuit court, asking the court to declare that IDS was limited to discovery provided by § 788.07. IDS moved to stay the circuit court proceedings and asked the court for an order compelling arbitration. IDS argued that the arbitration panel, not the circuit court, had the authority to determine the scope of discovery allowed by the arbitration agreement.

Following a hearing, the circuit court denied IDS's motion and granted the Marlowes' request for a declaratory judgment. The circuit court found in part that arbiters are empaneled to arbitrate, but the arbiters have no authority to interpret the contract between the parties. They're to arbitrate what the contest is all about.

IDS appealed, and the Court of Appeals reversed. IDS argued that the circuit court lacked authority to grant a declaratory judgment on the discovery issue because an arbitration panel's intermediate rulings are not reviewable by a court until after the panel has rendered its final award. The Court of Appeals noted the Wisconsin Arbitration Act does not specifically allow for or prohibit circuit court review of a panel's intermediate rulings, and it said the question of whether intermediate rulings may be challenged in court before a final award is made appears to be an issue of first impression in Wisconsin.

The Court of Appeals agreed with the reasoning of federal cases that an arbitration panel's intermediate decisions are generally not immediately reviewable since if every individual decision were independently reviewable by a circuit court, the advantages of arbitration would become meaningless, as both litigation costs and delay would increase significantly. Having concluded that a party generally may not seek immediate circuit court review of an arbitration panel's intermediate decision, the Court of Appeals said the circuit court's order must be reversed.

The Marlowes say the Court of Appeals' decision will not apply just to arbitration clauses in uninsured motorist policies but will apply to all arbitration clauses in all contracts, whether commercial purchase contracts, employment contracts, and partnership or shareholder agreements. The Marlowes argue the Court of Appeals' decision will have a chilling effect on all types of arbitration and will likely create a burden on the trial system because parties would not be willing to engage in arbitration if it is going to be as costly and time consuming as litigation.

IDS argues that once an arbitration agreement makes some arguable reference to a set of established procedures, the arbitration panel then has the authority to interpret the reference. IDS says it is arguable that the phrase "local rules of law as to procedure and evidence" refers to the Wisconsin procedural statutes which specify allowable discovery procedures.

A decision by the Supreme Court would help to further develop and clarify the holding of Borst v. Allstate Ins. Co., 2006 WI 70, 291 Wis. 2d 361, 717 N.W.2d 42. Borst said that "parties would be well served to either: (1) explicitly address the scope of discovery and the procedures to resolve disputes regarding discovery; or (2) reference a set of established ADR provider rules that specify how discovery should be handled."

WISCONSIN SUPREME COURT
THURSDAY, OCTOBER 4, 2012
1:30 p.m.

The Wisconsin Supreme Court is responsible for supervising the practice of law in the state and protecting the public from misconduct by lawyers. Lawyers must follow a code of ethics developed by the Court. When there is an allegation that a lawyer has acted unethically, the Supreme Court's Office of Lawyer Regulation (OLR) investigates, and, if warranted, prosecutes the attorney. A referee - a court-appointed attorney or reserve judge - hears the discipline cases and makes recommendations to the Supreme Court. The lawyer involved in this case has a practice in Milwaukee.

2011AP659-D Office of Lawyer Regulation (OLR) v. Joseph W. Weigel

In this case, Atty. Joseph W. Weigel has appealed the referee's recommendation that his license to practice law in Wisconsin be suspended for 30 months on 10 counts of professional misconduct. The OLR has cross-appealed the sanction recommendation and asks the Supreme Court to revoke Weigel's license.

Weigel has been licensed to practice law in Wisconsin since 1960 and practices in Milwaukee. His practice focuses on personal injury cases. Weigel was privately reprimanded in 1979. Earlier this year he was publicly reprimanded for entering into a stock redemption agreement that contained a "non-compete" clause restricting the rights of his former partner, Alvin Eisenberg, to practice after the termination of their relationship and for misleading clients and the public by continuing to use the firm name, "Eisenberg, Weigel, Carlson, Blau & Clemens, S.C.," after Eisenberg left the firm. In re Disciplinary Proceedings Against Weigel, 2012 WI 71, 342 Wis. 2d 129, 817 N.W.2d 835.

Prior to March 1, 1999, Weigel was a 4-percent shareholder and officer in the firm Eisenberg, Weigel, Carlson, Blau & Clemens, S.C. Pursuant to a stock redemption agreement of March 1, 1999, Weigel, along with Attys. Clemens and Blau, became the sole shareholders in the firm. Weigel has served as president of the firm since that time.

Prior to March 1, 1999, Eisenberg controlled the firm's trust accounts and generally controlled the firm. Weigel told investigators that in 1995 or 1996 the firm sustained a third-party forgery loss in excess of $50,000 from its trust account.

In 1996 or 1997, the firm sustained another third-party forgery loss of approximately $20,000 from its trust account. Those trust account theft losses were not reported to the OLR and the trust account was not replenished to replace the missing funds. In addition, the trust account was not isolated or replaced with a new trust account and the firm did nothing to determine the exact amount of the trust account deficiency.

Although Weigel had signature authority on the trust account for at least part of the 1990s, he testified that he was not specifically aware of the losses sustained to the account at the time of the thefts. He was, however, aware of the losses at the time he entered into the stock redemption agreement in March 1999. Both before and after March 1999, neither the prior or successor law firm regularly kept transaction ledgers, individual client ledgers, copies of monthly bank statements, deposit records, disbursement records, or monthly reconciliation reports for the trust account.

Weigel stated that before he bought Eisenberg out, he understood the trust account was running a deficit but he claimed he did not know its magnitude. He said that when he and his partners bought Eisenberg out he believed the deficit to be in the $200,000 or $250,000 range.

Approximately six months after the buyout Weigel testified he realized the deficit was closer to $1 million. Weigel did not report the deficit to OLR. He said he and his partners have been endeavoring to reduce the deficit by injecting personal funds into the trust account. He also said that clients who are owed settlement monies are being paid promptly albeit out of funds that belong to other clients and he admits that third parties who are owed funds, such as health care providers, have to wait for payment until sufficient funds become available. Weigel says since 2000 the deficit in the trust account has been reduced from $1 million to $100,000 to $150,000.

The OLR's complaint alleged that Weigel failed to maintain trust account records as required by Supreme Court rules, failed to promptly deliver funds to third parties payees, and converted funds belonging to clients. The referee found that the OLR met its burden of proof as to all counts of misconduct. The referee recommended that Weigel's license be suspended for 30 months and that he be required to pay the costs of the proceeding. Weigel has appealed, arguing that OLR did not meet its burden of proof as to all counts of misconduct and that the appropriate sanction would be a public reprimand or a short suspension. The OLR has cross-appealed, arguing that Weigel's license to practice law should be revoked.

The Supreme Court is expected to decide whether Weigel engaged in misconduct and, if so, the appropriate sanction.

WISCONSIN SUPREME COURT
FRIDAY, OCTOBER 5, 2012
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which reversed a Milwaukee County Circuit Court decision, Judge Dennis R. Cimpl, presiding.

2010AP1952 State v. Avery

This criminal case examines whether the Court of Appeals erred in granting a new trial, either on grounds of newly discovered evidence or on grounds that the real controversy was not fully tried due to the absence of proffered new evidence from digitally enhanced videotape.

Some background: In July of 1994, the Brian K. Avery was convicted by jury on two counts of armed robbery as party to a crime, based on robberies that occurred one day apart at two Milwaukee grocery stores. Both stores had interior video surveillance cameras. He was sentenced to 10 years in prison for one robbery and 20 years in prison for the other, to be served consecutively. A post-conviction motion was denied, and the Court of Appeals affirmed the judgment of conviction and post-conviction orders.

In 2007 the defendant moved for post-conviction relief under Wis. Stat. § 974.06, seeking a new trial based both on newly discovered evidence and in the interest of justice. The newly discovered evidence was a new method of digitally enhancing the videotape from a surveillance camera that was not available at the time of trial.

The defendant claimed the new video enhancement and photogrammetric analysis showed that the man who was identified as the defendant in the videotape was actually several inches shorter than the defendant. The defendant's booking photo established that he was six feet, three inches tall, had a mustache, wore his hair short and flat on top and faded to extremely short hair on the sides and back. The post-conviction motion alleged that it was reasonably probable the jury would have a reasonable doubt as to whether the defendant was involved in the robberies. The circuit court denied the motion without a hearing. The defendant appealed, and the Court of Appeals summarily reversed and remanded with directions to conduct an evidentiary hearing on the newly discovered evidence claims.

At the close of the evidentiary hearing, the circuit court concluded that the evidence was discovered after trial; the moving party was not negligent in seeking the evidence; the evidence was material to an issue in the case; and the evidence was not merely cumulative to evidence that was introduced at trial. However, the court declined to find that it was reasonably probable a different result would be reached on a new trial. See State v. Edmunds, 2008 WI App 33, ¶13, 308 Wis. 2d 374, 746 N.W.2d 590.

The circuit court concluded that at a new trial the new evidence was "simply not going to make a difference" because it was "not reliable enough." The circuit court also found that the newly discovered evidence did not justify a new trial in the interest of justice because it did not "totally destroy the prosecution's case" although "certainly, the photogrammetry evidence could chip away at the prosecution's case but it wouldn't destroy it." The defendant appealed, and the Court of Appeals reversed and remanded. The Court of Appeals said it is solely for the jury to determine whether some competing credible evidence is entitled to greater weight than other credible evidence.

The trial court concluded that because the photogrammetry evidence would chip away at the prosecution's case but not totally destroy it, a new trial was not warranted. The Court of Appeals said no Wisconsin case interpreting § 752.35 requires that the defendant's new evidence totally destroy the prosecution's theory.

The Court of Appeals said in this case the circuit court clearly weighed the expert testimony on its own, thus applying the wrong standard and erroneously exercising its discretion.

The state argues the trial court properly assessed the unreliability of the defendant's proffered photogrammetry evidence in determining the probable outcome at a new trial.

A decision by the Supreme Court could develop and clarify the law on unsettled questions concerning the tests for newly discovered evidence and interest of justice in criminal cases.

WISCONSIN SUPREME COURT
FRIDAY, OCTOBER 5, 2012
10:45 a.m.

The Wisconsin Supreme Court is responsible for supervising the practice of law in the state and protecting the public from misconduct by lawyers. Lawyers must follow a code of ethics developed by the Court. When there is an allegation that a lawyer has acted unethically, the Supreme Court's Office of Lawyer Regulation (OLR) investigates, and, if warranted, prosecutes the attorney. A referee - a court-appointed attorney or reserve judge - hears the discipline cases and makes recommendations to the Supreme Court. The lawyer involved in this case has a practice in Waukesha.

2011AP259-D Office of Lawyer Regulation v. Matthew C. Siderits

In this case, Atty. Matthew C. Siderits has appealed the referee's recommendation that his license to practice law in Wisconsin be suspended for 18 months for five counts of professional misconduct.

Atty. Siderits has been licensed to practice law in Wisconsin since 1996. Atty. Siderits has no previous disciplinary history.

At times relevant to this case, Siderits worked for a law firm in Milwaukee. Siderits was a shareholder of the firm, and also served as the firm's treasurer.

The misconduct alleged in the OLR's complaint concerned Attorney Siderits's billing practices. The OLR alleged that in 2007 and 2008, Siderits artificially inflated his billable hours so that he could collect a bonus payable upon hitting a certain billable hour target; then, after collecting his bonus, and without informing his partners or the firm's bookkeeper, Siderits wrote-down (i.e., reduced) his inflated hours before the firm sent the bills to his clients. The OLR alleged that Siderits kept his bonuses even though his billable hours after the write-downs fell below the billable hour target.

The referee found that the OLR met its burden of proof as to all counts of misconduct. The referee recommended that Attorney Siderits's license be suspended for 18 months.

Siderits has appealed, generally arguing that he accurately recorded his time, that he wrote-down his bills in a good faith effort to ensure his clients were not billed excessive amounts, and that at the time of his actions, he was unaware of any law firm policy or Wisconsin case law that prohibited his conduct. Siderits additionally argues that he should receive, at most, either a public reprimand or a license suspension of between two and six months.

The Supreme Court is expected to decide whether Siderits engaged in misconduct and, if so, the appropriate sanction.

WISCONSIN SUPREME COURT
TUESDAY, OCTOBER 9, 2012
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which reversed a Sheboygan County Circuit Court decision, Judge L. Edward Stengel, presiding.

2010AP3153 Bethke v. Auto-Owners Ins. Co.

This case, arising from a fatal car accident, examines two issues related to underinsured motorist (UIM) coverage: whether an insurance policy that excludes self-insured vehicles from UIM coverage contains an impermissible reducing clause; and whether refusal to pay proceeds based on the definition of underinsured motor vehicle under the facts presented in this situation is contrary to public policy.

Some background: On July 19, 2007, Kathryn Bethke and Andrew Bethke were involved in a traffic accident with Frederick Goddard in Sheboygan Falls. Both Kathryn and Goddard died as a result of their injuries. Andrew, a passenger in Kathryn's car, was injured in the collision. Goddard was driving a car rented from AVIS Rent-A-Car.

The Bethkes allege that Goddard, who did not have his own car insurance, was driving negligently. AVIS had obtained a Wisconsin safety responsibility self-insurance certificate as permitted by Wis. Stat. § 344.16. Under its self-insurance certificate, AVIS is liable for damages in the amount of $25,000 per claim and $50,000 per accident – the minimum statutorily allowable amount. AVIS tendered $25,000 each to Andrew and to Kathryn's estate.

At the time of the accident, Kathryn had a car insurance policy through Auto-Owners Insurance Co. (Owners). The policy included underinsured motorist (UIM) coverage in the amount of $500,000 per occurrence. After receiving the statutory minimum $50,000 from AVIS, the Bethkes made a $450,000 demand under the UIM provisions of Kathryn's policy with Owners.

Owners denied the claim, contending that AVIS' automobile was a self-insured automobile excluded from coverage under its UIM policy provisions.

The Bethkes sued Owners for a survivor's action, wrongful death, bad faith, and personal injuries to Andrew. The trial court granted declaratory relief to Owners, holding that the UIM policy provisions permissibly and unambiguously excluded the self-insured vehicles owned by AVIS. The Court of Appeals affirmed.

The Court of Appeals concluded that Owners' exclusion of self-insured vehicles from its policy definition of "underinsured automobiles" is permitted under Wis. Stat. § 632.32(6), does not function as an impermissible reducing clause, and cannot be deemed contrary to public policy.

The Bethkes challenge these conclusions in their arguments to the Supreme Court.

WISCONSIN SUPREME COURT
TUESDAY, OCTOBER 9, 2012
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which reversed a Milwaukee County Circuit Court decision, Judge Dennis P. Moroney, presiding.

2011AP593 Jamerson v. Dept. of Children & Families

This case examines Wisconsin's new caregiver law, specifically, Wis. Stat. § 48.685(5)(br)5., which mandates that a childcare provider's certification *must* be revoked if the provider has been convicted of the enumerated public assistance offenses.

A decision by the Supreme Court could help determine the proper standard of review to apply to state department of Children and Family (the department) decisions involving Wis. Stat. § 48.685(5)(br)5., and clarify whether a previous conviction under § 49.12(1) & (6) (1989-90), now renumbered as § 49.95, constitutes a barring conviction for purposes of § 48.685(5)(br)5.

Some background: At issue in this case is the department's determination that Angelina Jamerson was permanently prohibited from obtaining a group childcare license under Wisconsin's new caregiver law.

Jamerson was the owner of Children's Fantasy Child Care & Preschool. On Dec. 11, 2009, the department notified Jamerson that her group childcare license would be summarily suspended as of 12 a.m. the next day. The department summarily suspended her license because four months earlier, a Children's Fantasy employee, Brenda Ashford, allegedly had sold marijuana to an undercover police officer as part of a controlled buy; the buy had taken place during business hours and on a corner just west of Children's Fantasy.

Shortly after receiving the summary suspension notice, Jamerson faxed a letter to the department stating that she had terminated Ashford and that Ashford would remain terminated regardless of the results of the pending charges. Three days later, on Dec. 14, 2009, Jamerson submitted an affidavit explaining that: (1) she had no knowledge of the charges against Ashford until the department had contacted her about them; (2) she had fired Ashford and prohibited her from coming near the vicinity of Children's Fantasy; and (3) she had met with her staff regarding the incident.

Despite Jamerson's submissions, the department revoked Jamerson's childcare license on Jan. 20, 2010. The notice of revocation cited two grounds for the revocation: (1) Ashford's marijuana charges, to which Ashford had by this point pled guilty; and (2) the department's interpretation of the new child caregiver law, which would become effective Feb. 1, 2010.

The department alleged that Jamerson's 1991 convictions of offenses relating to food stamps and public assistance (1989-90), contrary to Wis. Stat. §§ 49.127(2m) and 49.12(1) & (6) (1989-90), permanently prohibited her from holding a license under § 48.685(5)(br)5.

Jamerson appealed the department's revocation, and the case was assigned to an administrative law judge (ALJ) at the Division of Hearings and Appeals. A few weeks before a scheduled hearing on the matter, the department filed a motion to dismiss Jamerson's appeal. The department argued that under the new caregiver law, Jamerson's prior food stamp offense amounted to an "automatic bar" preventing her from ever obtaining or holding a group childcare

license. The ALJ agreed, and the department adopted the ALJ's decision as its final order on the matter.

Jamerson appealed the department's final order to the trial court. The trial court affirmed. Jamerson appealed. The Court of Appeals reversed the department's final decision and the trial court's order.

The department asks the Supreme Court to review whether Jamerson's 1991 conviction under Wis. Stat. § 49.12(1) and (6) bars Jamerson from licensure under Wis. Stat. § 48.685(5)(br)5. The department additionally asks the Supreme Court to determine the appropriate level of deference to afford the department's decision on this point, and to decide whether the ALJ properly upheld the revocation without first conducting a contested case hearing.

WISCONSIN SUPREME COURT
TUESDAY, OCTOBER 9, 2012
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a Kenosha County Circuit Court decision, Judge Barbara A. Kluka, presiding.

2011AP407-09-CR State v. Novy

This case examines two issues arising from the conviction of Brent T. Novy on two counts of stalking, six counts of bail jumping, and one count of violating a harassment restraining order:

- Did the trial court err in allowing fingerprint evidence to be admitted in the state's rebuttal when the court had previously ruled the evidence was not admissible because the state violated the discovery statute by not providing it to the defense?
- Was Novy deprived the right to an impartial jury and fair trial when defense counsel observed a juror sleeping during his closing argument?

Some background: One of the bail jumping counts against Novy arose out of an allegation that, after having previously been charged with felony stalking and having been released from custody, he violated the conditions of his release by telephoning his former fiancée on Nov. 9, 2008, from the pay phone at L&M Meats.

In its opening statement, the prosecutor represented that the jury would hear testimony from a police officer who had obtained Novy's thumb print from the pay phone and that the jury would also hear testimony from the officer who had matched the thumb print found on the pay phone to the defendant.

At the close of opening statements, defense counsel moved to exclude the fingerprint evidence because the state had not provided test results or comparisons of any such evidence, despite a timely discovery demand by Novy. The circuit court excluded the fingerprint evidence based on the state's failure to designate the analyst as an expert prior to trial.

As the state presented its case, the former fiancée testified that on Nov. 9, 2008, she had received a call from the pay phone at L&M Meats. She said she found the phone number from which the call was made was assigned to that pay phone by calling her sister from the pay phone and having the sister write down the number from caller ID.

At the close of the state's case, the defendant moved to dismiss one count (count seven) of the bail jumping charges based on a lack of evidence linking him to the pay phone call from L&M Meats. The state conceded that without the fingerprint evidence there was no evidence linking the defendant to the call. Based on the state's concession, the circuit court dismissed count seven. When the state asked if the fingerprint evidence would be available on rebuttal, the trial court responded that it did not know.

On cross-examination, Novy said he did not call his former fiancée from L&M Meats on Nov. 9, 2008, at approximately 8 p.m. When asked if it anticipated calling rebuttal witnesses,

the state said given the defendant's denial of making the L&M Meats phone call, "I think at this time the fingerprint evidence is proper for rebuttal." Defense counsel objected, arguing the fingerprint evidence would not rebut the defendant's testimony. Defense counsel also argued that the use of previously requested and undisclosed physical evidence was not akin to a "rebuttal witness."

The circuit court ruled that the fingerprint evidence was "bona fide rebuttal evidence" and noted a rebuttal witness is permitted to use physical evidence in connection with his testimony. On rebuttal, the state presented evidence from the officer who took the fingerprints from the pay phone and from the officer who verified that the fingerprints belonged to the defendant. Novy testified that he had used the pay phone but said he had called a friend in the Philippines.

The majority of the Court of Appeals concluded that the circuit court's initial exclusion of the fingerprint evidence did not necessarily preclude its later admission as rebuttal evidence. The majority noted the trial court expressly left open the question of whether the fingerprint evidence could be used in rebuttal.

Court of Appeals Judge Paul F. Reilly dissented, saying in part "the evidence of the phone call from Nov. 9, 2008, as received by the trial court, was irrelevant to any of the charges Novy was being tried on."

While the state notes that Reilly's dissent drew the conclusion that there was no criminal charge associated with the defendant's conduct in making a phone call from L&M Meats the state says, "Novy did not raise an 'other acts' objection to the admissibility in the circuit court or on appeal."

Novy also contends he was deprived of his right to an impartial jury when the circuit court refused to strike a juror who was sleeping during defense counsel's closing argument.

WISCONSIN SUPREME COURT
TUESDAY, OCTOBER 23, 2012
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which reversed a Washington County Circuit Court decision, Judge James G. Pouros, presiding.

2011AP564 Schinner v. Gundrum

This case examines the meaning of "occurrence" and "accident" under the terms of a homeowners insurance policy and how they apply to the facts presented here. The Supreme Court is asked to review whether a homeowners insurance policy covers the 21-year-old host of a drinking party who provided alcohol to an underage guest who assaulted another guest.

Some background: Marshall Schinner filed a lawsuit alleging that he sustained serious injuries after being assaulted by Matthew Cecil. Cecil was a guest at a party hosted by Michael Gundrum in a shed on Gundrum's parent's business property. The shed was used in part to store personal property, including snowmobiles that were explicitly listed in a West Bend Insurance Co. homeowner's policy.

Cecil, who was under the legal drinking age at the time, became belligerent and assaulted Schinner during the party. The parties agree that Cecil's assault on Schinner was intentional and that Schinner's injuries did not result from inadvertent or merely reckless conduct by Cecil. The parties also agree there is no allegation that Gundrum personally participated in or assisted Cecil.

Schinner sued Gundrum for negligence, alleging that Gundrum's conduct, which included providing alcohol to Cecil, was a cause of the assault and Schinner's resulting injuries. West Bend was added to the suit. West Bend moved for summary judgment, arguing it should be dismissed from the case because there was no "accident," and therefore no "occurrence" under the policy.

The circuit court agreed with West Bend and dismissed it from the case. The circuit court explained, "Based on the undisputed facts in this case, there is simply no 'occurrence.' ... There is no allegation of any accidental conduct. The acts of Cecil are intentional acts – punching Schinner twice and kicking Schinner in the head. Further, any acts on the part of Michael Gundrum were intentional, namely his providing of alcoholic beverages to underaged persons."

The circuit court also agreed with West Bend's alternate argument that the homeowner's policy was inapplicable because the injury to Schinner did not occur at an insured location. Schinner appealed, and the Court of Appeals reversed and remanded.

The Court of Appeals said the primary issue presented was whether there was an "occurrence" for purposes of coverage. While the West Bend policy does not define the term "accident," the Court of Appeals noted that prior cases have defined the term as an event which takes place without one's foresight or expectation. The Court of Appeals agreed with Schinner that the assault was an "accident" from Gundrum's standpoint as well as from Schinner's.

West Bend says a decision from this court would resolve an apparent conflict in previous appellate court decisions and provide needed guidance on the proper analysis for Wisconsin courts to employ when determining whether an assault constitutes an "occurrence" under a homeowner's liability insurance policy.

WISCONSIN SUPREME COURT
TUESDAY, OCTOBER 23, 2012
10:45 a.m.

The Wisconsin Supreme Court is responsible for supervising the practice of law in the state and protecting the public from misconduct by lawyers. Lawyers must follow a code of ethics developed by the Court. When there is an allegation that a lawyer has acted unethically, the Supreme Court's Office of Lawyer Regulation (OLR) investigates, and, if warranted, prosecutes the attorney. A referee - a court-appointed attorney or reserve judge - hears the discipline cases and makes recommendations to the Supreme Court. The lawyer involved in this case has a practice in Milwaukee.

2010AP2492-D Office of Lawyer Regulation (OLR) v. Riley

In this attorney disciplinary proceeding, Atty. John Kenyatta Riley appeals from the report and recommendation of the referee, who concluded that Riley had violated three provisions of the Rules of Professional Conduct for Attorneys and recommended that Riley be publicly reprimanded.

Some background: The ethical charges against Riley arise out of his representation of Atty. Brian Polk in Polk's 2006 reinstatement proceeding. Polk's license to practice law in Wisconsin had been administratively suspended for several years due to his failure to comply with his mandatory continuing legal education reporting obligations. In February 2006 Polk personally filed a petition for reinstatement. Because of some issues raised by the Office of Lawyer Regulation (OLR) in its response to Polk's petition, the supreme court referred the matter to a referee with directions to consider and report on: (1) the number and type of citations involving the operation of a motor vehicle that Polk had received, (2) the facts surrounding an incident in which Polk had received a citation for loitering-illegal drug activity, (3) the nature and status of any outstanding civil judgments against Polk, and (4) any other matter that the referee deemed helpful to the court's decision on the reinstatement proceeding.

The referee scheduled a hearing to receive testimony and documents. Prior to the September 2006 hearing, Riley agreed to represent Polk at the hearing before the referee. Riley indicates that he agreed to serve as a "second chair" attorney, with Polk being primarily responsible for representing himself. Riley, however, examined all of the witnesses and presented closing argument for Polk. During Riley's direct examination of Polk, he asked Polk what kinds of jobs he had held since the suspension of his license. Polk's response listed a number of jobs, but did not mention that he had worked for a law firm during the period of his suspension. On cross-examination, the OLR attorney asked Polk a series of questions regarding whether during the period of his suspension he had engaged in the practice of law, had held himself out as an attorney, had provided legal advice or legal research to anyone, or engaged in any law-related work activity. Polk responded that he had not done any of the activities listed in the OLR's questions.

The referee in the present disciplinary proceeding found that Polk's answers were not truthful because Polk had been employed by the Eisenberg Law Offices (which changed its name to Eisenberg & Riley at some point) for several months in late 2005 and early 2006. Riley became associated with that firm at some point in 2005, although he also continued to maintain

his own law office until early to mid-2006. Polk testified in the present case that during the several months he worked for the Eisenberg Law Offices, he was in the office approximately 50 hours per week, met with clients in the law office, and sent out letters to third parties that included his signature above the words "attorney at law." Based on Polk's testimony, the referee found that prior to Polk's reinstatement hearing in September 2006, Polk and Riley had discussed Polk's concern about have omitted from his responses to the OLR's requests the fact that he had been working for the Eisenberg Law Offices. The referee further found that Riley knew that Polk's testimony at the reinstatement hearing was false and that Riley failed to remedy the false evidence provided to the referee in the reinstatement proceeding.

On the basis of these facts, the referee concluded that (1) Riley had offered false material evidence and had failed to take reasonable remedial measures, in violation of SCR 20:3.3(a)(3); (2) had assisted a witness to testify falsely, in violation of SCR 20:3.4(b); and had engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, in violation of SCR 20:8.4(c). The referee recommended that the supreme court publicly reprimand Riley for these ethical violations.

In his appeal, Riley argues that the referee should have recommended dismissal of the misconduct charges against him because there was insufficient evidence to support a conclusion that prior to the 2006 reinstatement hearing Riley actually knew that Polk had been working for the Eisenberg Law Offices. He also asserts that because he asked an open-ended question about what jobs Polk had held since his administrative suspension, there is insufficient evidence to support a conclusion that Riley knew when he asked the question that Polk would fail to provide truthful testimony. Thus, he contends that he did not knowingly offer testimony that he knew to be false. Finally, Riley asserts that Polk's testimony regarding the jobs he held during his suspension and his failure to include his work for the Eisenberg Law Offices was not material to the issues in the reinstatement proceeding. Consequently, he argues that even if Polk was not truthful in his response and Riley knew of that fact, Riley had no obligation to remedy what he saw as immaterial evidence. He is therefore asking the court to reject the referee's conclusions and dismiss the misconduct charges against him.

The supreme court will review the referee's factual findings and legal conclusions regarding the misconduct charges. If it affirms any of the referee's conclusions of professional misconduct, it will determine what would be the appropriate level of discipline.

WISCONSIN SUPREME COURT
TUESDAY, OCTOBER 23, 2012
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a Winnebago County Circuit Court decision, Judge Barbara H. Key, presiding.

2011AP813-814 City of Menasha v. Gracia

These consolidated cases involve challenges to two separate drunken driving convictions against Juan G. Gracia. In one case, the Supreme Court examines whether police entry into Gracia's bedroom while investigating a 2010 incident that led to his fourth operating while intoxicated (OWI) conviction was lawful under the community caretaker doctrine. Because of the progressive nature of the penalties for OWI convictions, Gracia also challenges his second OWI conviction, which occurred in 1998, on the ground that he did not validly waive his right to counsel before entering a *pro se* guilty plea.

Some background: On Feb. 26, 2010, Menasha police observed a yellow traffic light pole that had been struck and was lying near an intersection. Police found a license plate nearby that was ultimately tied to a white 1999 Buick Regal apparently owned by a member of the Gracia family.

After receiving additional information, police went to Gracia's trailer home where they found a white 1999 Buick Regal with considerable damage to its right front that bore some yellow paint similar to the paint used on traffic poles.

Police officers were not able to get Gracia to respond to their visit. As police were about to leave, Gracia's brother, who also lived in the trailer, arrived. Police told him they wanted to check to see if Gracia was OK because they were concerned he may have been injured in an accident.

Gracia's brother went into the home for a short time before returning to lead officers into the home and toward Gracia's locked bedroom. Officers tried to open the door, but could not. Gracia objected to the police presence and asked his brother to make the police go away. Without any explicit suggestion or request from police, the brother rammed his shoulder into the door, causing it to open. The officers then simply walked into the bedroom.

Once inside the bedroom, the police found Gracia lying on his bed and detected the smell of alcohol. Gracia told the police that he had been driving the Buick. The officers then arrested him, and Gracia was charged with OWI-fourth offense. He filed a motion to suppress, arguing that the officers' warrantless entry into his bedroom had been unconstitutional. The circuit court denied the motion, finding that the officers' entry into his bedroom had been justified under the community caretaker doctrine.

While the charge was pending, Gracia also filed a motion collaterally attacking his 1998 conviction for OWI-Second Offense in order to reduce the current charge from an OWI-Fourth Offense to an OWI-Third Offense.

At the time of the 1998 case Gracia was 23 years old and had never been represented by an attorney. He testified at the hearing in the 2010 case that he had believed he did not have any defenses to the OWI-Second Offense charge against him and that a lawyer would not really be

able to help him. Gracia consistently indicated in 1998 that he did not want a lawyer. The circuit court at the time ultimately went forward with the plea colloquy and accepted Gracia's plea.

In the 2010 case, the circuit court rejected Gracia's collateral attack on his 1998 conviction, concluding that Gracia had validly waived his right to counsel through a "conscious decision" to not spend the money it would cost to hire an attorney.

The Court of Appeals affirmed on both issues.

Gracia asserts that the Court of Appeals decision is "tantamount to permitting police to make warrantless entries to the homes of Wisconsin citizens after every car accident to see if someone may be hurt." He also argues that he did not make a truly knowing and intelligent waiver of his right to counsel in 1998 case. He points to the fact the trial court never explained that an attorney might be able to find defenses to the charge or might be able to mitigate the charge or the potential sentence.

A decision by the Supreme Court could clarify law surrounding the community caretaker function of police and the standards involved in waiving the right to counsel.